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constructive notice of his claim will not defeat the right of one seeking subrogation,¹³ unless the latter has failed to exercise due care in examining the records.¹⁴

The majority of courts have ostensibly determined the right to priority of one seeking subrogation by deciding whether he is a volunteer,¹⁵ but they have not considered him one because of his voluntary payment of the debtor's obligation, but because under the circumstances he was not justly entitled to the privilege.¹⁶ The rule refusing subrogation to a volunteer is therefore useless, as well as without logical foundation, in cases similar to the principal one, and should not be used as a basis for denying the plaintiff that priority to which the court conceded he would have been justly entitled if his payment had not been voluntary.¹⁷

DOUBLE JEOPARDY AS APPLIED TO TWO ACTS INCLUDED IN THE SAME TRANSACTION.—It is obvious that a plea of double jeopardy will be valid only when a second indictment charges an offense identical in law and fact with that for which the defendant was formerly tried.¹ Many difficulties, however, have been experienced in the application of this rule to particular facts. Thus a situation which has produced varied results is presented by the recent case of *Munson v. M'Claghry* (1912) 198 Fed. 72. The defendant was tried upon an indictment consisting of two counts, one alleging a breaking and entering into a post-office with intent to steal, and the second a larceny committed within. He was convicted and sentenced upon both counts, and, after serving his sentence for the burglary, sued out a writ of Habeas Corpus for his release from the penitentiary, claiming that the conviction for larceny violated the Constitutional provision against double jeopardy. The court sustained this contention, arguing that as both offenses were part of the same transaction, to punish them as separable crimes would amount to a two-fold punishment of the same criminal intent.

Although this view finds some support among the authorities, it has been repudiated in the majority of cases.² The test generally employed

¹³*Home Savings Bank v. Bierstadt supra*; *Emmert v. Thompson* (1892) 49 Minn. 386.

¹⁴*Fort Dodge etc. Ass. v. Scott* (1892) 86 Ia. 431; *cf. Rice v. Winters supra*.

¹⁵But see *Bruse v. Nelson supra*; *Emmert v. Thompson supra*.

¹⁶So when the defendant has fraudulently induced the plaintiff to accept a substituted security in order that his own intervening incumbrance may then obtain priority, the plaintiff will be entitled to subrogation. *Short v. Currier* (1891) 153 Mass. 182; *Waldo v. Richmond* (1879) 40 Mich. 380.

¹⁷A Nebraska court similarly felt that adherence to a maxim of equity jurisdiction should be more determinative of the result than considerations of the "natural and inherent" justice of the case. *Bohn etc Co. v. Case supra*.

¹4 Bl. Comm. 336. In *Commonwealth v. Roby* (Mass. 1832) 12 Pick. 496, 504, it is said: "The plea will be vicious if the offences, charged in the two indictments, be perfectly distinct in point of law, however nearly they may be connected in fact * * *"

²*Sharp v. State* (1901) 61 Neb. 187; *State v. Ingalls* (1896) 98 Ia. 728; *Ex parte Peters* (1880) 12 Fed. 461; *Territory v. Willard* (1889) 8 Mont. 328; *People v. Parrow* (1890) 80 Mich. 567; *Bishop, New Criminal Law*, § 1062. By statute, the same result has been reached in Texas, Missouri and Arkansas. See *Howard v. State* (1880) 8 Tex. App. 447; *State v. Martin* (1882) 76 Mo. 337; *Dodd v. State* (1878) 33 Ark. 517.

to determine whether a defendant is put in double jeopardy by a second indictment is that if proof of the facts alleged in the second indictment would have sustained a conviction under the former one, the offenses charged must be regarded as identical in law.³ A strict application of this rule to the facts of the principal case would clearly lead to a result contrary to that reached by the court. Obviously proof of the facts essential to a conviction for larceny would not prove a burglary. The former crime consists merely of an unlawful asportation of goods;⁴ the essential elements of the latter are a breaking and entering with intent to commit a felony.⁵ Moreover, if it be admitted that the two offenses are thus separate and distinct in law, their proximity in fact cannot render it unconstitutional to punish a defendant for each of them.⁶

On the other hand, it is undoubtedly contrary to the spirit of the Constitution to permit the prosecutor to subdivide one crime into several parts, and secure a punishment for each.⁷ Thus a defendant would clearly be placed in double jeopardy if he were tried for each of several blows struck in the commission of a battery. It is often said that a prosecutor may, in the indictment, cut out as large a part of an offense as he chooses, but that he may cut only once.⁸ And since burglary and larceny committed in the course of a single wrongful transaction may be charged in the same count of an indictment,⁹ it has been argued that a defendant may validly object to their severance.¹⁰ But under such an indictment the larceny is regarded as a part of the burglary only in that it serves as a substitute for the felonious intent which is an essential element of the burglary, since it is the best possible evidence that such an intent existed.¹¹ Manifestly, a conviction of the combined felonies will bar a subsequent trial for either separately, since each has influenced the result of the first trial,¹² but that there is no real merger of the two crimes is demonstrated by the

³Emerson v. State (1884) 43 Ark. 372; cf. 6 COLUMBIA LAW REVIEW 110.

⁴2 East, Pleas of the Crown, 484.

⁵Ibid. 524; Wilson v. State (1855) 24 Conn. 57.

⁶People v. Devlin (1904) 143 Cal. 128; Wilson v. State *supra*. In Gordon v. State (1882) 71 Ala. 315, 318, the court says: "But it cannot be asserted properly and justly that the burglary and the larceny constituted a single act, or but a single crime. The burglary was a completed act, having every element and ingredient of a distinct, substantive, offence, before the larceny was committed; while it rested only in intention."

⁷State v. Cooper (1833) 13 N. J. L. 361; People v. Stephens (1889) 79 Cal. 428.

⁸Bishop, New Criminal Law, § 1057 *et seq.*

⁹Withal's Case (1772) 1 Leach 89; Breese v. State (1861) 12 Oh. St. 146.

¹⁰Roberts v. State (1853) 14 Ga. 8; Kite v. Commonwealth (Mass. 1846) 11 Met. 581; Triplett v. Commonwealth (1886) 84 Ky. 193; Halligan v. Wayne (1910) 179 Fed. 112.

This doctrine, refusing to allow the offender to be punished separately for two crimes perpetrated in "one transaction", is confined to cases where both offenses might have been included in one indictment. Copenhagen v. State (1854) 15 Ga. 264.

¹¹Commonwealth v. Hope (Mass. 1839) 22 Pick. 1.

¹²1 Hale, Pleas of the Crown, 559 *et seq.*; State v. Cocker (Del. 1840) 3 Harr. 554; Commonwealth v. Tuck (Mass. 1838) 20 Pick. 356; 1 Wharton, Criminal Law, (10th ed.) § 819.

fact that an acquittal of the burglary does not prevent a conviction under another indictment charging the intent to steal instead of the actual taking.¹³ It would seem, therefore, that the fact that the two crimes may be joined does not sufficiently establish their unity to render it a violation of the rule against double jeopardy to sentence for each. Moreover, the argument that this is opposed to the humane policy of our penal jurisprudence in that it punishes the defendant for each step of a transaction which is inspired by one criminal intent and which is in reality but a single continuing act, would seem to have little weight. Tenderness for the criminal should not prevent his being punished for each crime he has committed.¹⁴ The true view is that "while the two criminal acts may be regarded and indicted as a combined crime, neither enters into the nature or substance of the other",¹⁵ and therefore the defendant who has been sentenced for both burglary and larceny committed in the course of the same transaction cannot be heard to complain.

RIGHT TO RESCIND STOCK SUBSCRIPTIONS OBTAINED BY FRAUD.—In the English courts, the interpretation of "The Companies Act, 1862"¹ has long settled the rules applicable when the right of a stockholder to rescind a subscription fraudulently procured² conflicts with the claims of creditors of the corporation. So long as the corporation remains solvent, the shareholder who has proceeded with diligence may rescind the contract and recover payments made thereunder;³ but when the company has become insolvent the rights of creditors attach upon the "winding up" and prevent rescission, every shareholder of record being deemed liable as a contributory,⁴ even though the fraud could not have been discovered until after insolvency.⁵ This is, of course, purely a question of statutory construction, and should have no influence on the abstract problem presented to American courts.⁶

¹Vandercomb's Case (1796) 2 Leach 816.

²State v. Nash (1882) 86 N. C. 650; State v. Faulkner (La. 1887) 2 So. 539; Copenhagen v. State *supra*.

³Gordon v. State *supra*.

⁴25-26 Vict. c. 89.

⁵At one time a corporation was not bound by the fraudulent representation of an agent, but it is now settled that a corporation cannot retain the benefits of a subscription obtained through the fraud of an agent without an assumption of the burden. 14 Am. L. Rev. 178 *et seq.*; *r* Cook, Corp., §§ 139, 140.

⁶Ry. Co. v. Kisch (1867). L. R. 2 Eng. & Ir. App. 99. The shareholder must have his name removed from the register, *In re Hull and County Bank* (1880) L. R. 15 Ch. Div. 507, but if he has commenced an action for this purpose, the subsequent insolvency of the corporation is immaterial. *Smith's Case* (1867) L. R. 2 Ch. App. 604.

⁷25-26 Vict. c. 89, § 23. " * * * and every person who has agreed to become a Member of a Company under this Act and whose Name is entered on the Register of Members, shall be deemed to be a Member of the Company." *Oakes v. Turquand* (1867) L. R. 2 Eng. & Ir. App. 325.

⁸*Stone v. City and County Bank* (1877) L. R. 3 C. P. D. 282.

⁹*Oakes v. Turquand supra*, at page 353: "In the conclusion at which I have arrived in this case I rely altogether upon the words of the Act. I do not take into consideration the principle which has governed many decisions, as to which of two innocent persons is to suffer." A similar